CHARLES GRENIER SDN. BHD.

v.

LAU WING HONG

FEDERAL COURT, KUALA LUMPUR
ANUAR ZAINAL ABIDIN CJ (MALAYA)
MOHAMED AZMI FCJ
GOPAL SRI RAM JCA
[CIVIL APPEAL NO: 02-425-94]
20 SEPTEMBER 1996

CONTRACT: *Sale and purchase of property - "Subject to contract" agreements - Agreements to make agreements - Whether results in enforceable contracts - Whether for Court to review on case by case basis.*

LAND LAW: *Conveyancing - Agreement for sale of property - Construction - "Subject to the sale and purchase agreement" - Whether parties intend to be immediately bound - Whether parties intend performance of terms conditional upon execution of formal contract - Whether parties intend no binding agreement until execution of formal contract.*

The appellant who was the registered proprietor of two shophouses in Ipoh ('the shophouses') had wanted to sell the shophouses. It engaged the services of an estate agent ('the agent') who found a purchaser in the person of the respondent. On 23 November 1989, the appellant's solicitors wrote to the agent accepting the respondent's offer to purchase the shophouses on the express condition that a 10% deposit of the purchase price be paid up by 28 November 1989. On 28 November 1989, the agent responded by letter confirming the respondent's offer to purchase the shophouses and enclosed therewith the 10% deposit.

On 29 November 1989, three persons ('the alleged purchasers') caused to be issued a writ against the agent and the appellant. The alleged purchasers sought, *inter alia*, specific performance of an agreement made earlier for the sale of the same shophouses to themselves. On the same day the alleged purchasers obtained an *ex parte* injunction restraining the appellant from entering into any agreement for the sale of the shophouses to any other person. The injunction was served on the appellant on 30 November 1989.

In January 1992, the appellant unsuccessfully applied to have the writ struck out and the injunction set aside. On 29 October 1994, the appellant took out a summons claiming a declaration that the agreement between itself and the respondent had been frustrated by the injunction. The summons was dismissed

and the appellant appealed to the instant Court, canvassing, principally, that there was no concluded contract between the respondent and itself as the agreement was one which was made 'subject to contract.'

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] Generally, an agreement to make an agreement does not result in a contract. It is for the Court, in each case, to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If, however, the Court reaches an opposite conclusion, then there is an enforceable contract.

[2] Unless the above approach is adopted, a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would then find the law to be a huge loop-hole and commerce would come to a virtual standstill.

[3] The law leans in favour of upholding bargains and not in striking them down willy-nilly. This principle applies not only to documents drafted by laymen but also to those prepared by lawyers.

[4] In the instant appeal, the correspondence between the parties did not evince that they intended no concluded contract until a formal sale and purchase agreement had been executed by them. The phrase "subject to the sale and purchase agreement" did not point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, the phrase was indicative of an intention to merely formalise the agreement already concluded between the parties.

[5] The parties to the transaction, the property, the price, and the essential terms have all been identified with sufficient clarity. Such an agreement is commonly termed as an 'open contract.' It is enforceable as if it was embodied in a document with all the attendant solemnity. And in order to give it effect, the law will, acting out of necessity, imply terms into the contract for sale in order to make it work.

[6] The injunction was granted after the contract between the appellant and the respondent had been made; thus, it had no effect upon the transaction that had already been concluded.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

KONTRAK: *Penjualan dan pembelian hartanah - "Tertakluk kepada perjanjian" - Perjanjian bagi membuat perjanjian - Samada "menghasilkan" kontrak yang boleh dikuatkuasakan - Samada terpulang kepada Mahkamah untuk mengkaji semula berdasarkan kes demi kes.*

UNDANG-UNDANG TANAH: *Kaedah pemindahhakan - Perjanjian untuk penjualan hartanah - Takrifan - "Tertakluk kepada perjanjian jualbeli" - Samada pihak-pihak bermaksud untuk menjadi terikat dengan serta merta - Samada pihak-pihak berniat untuk melaksanakan terma-terma bersyarat setelah penyempurnaan kontrak rasmi - Samada pihak-pihak tidak berniat untuk mempunyai perjanjian yang mengikat sehingga penyempurnaan kontrak-kontrak formal.*

Perayu yang merupakan pemunya berdaftar dua buah rumah kedai di Ipoh ('rumah-rumah kedai tersebut') hendak menjual rumah-rumah kedai tersebut. Ianya telah melantik ejen hartanah ('ejen tersebut') yang telah memperolehi seorang pembeli yang merupakan responden. Pada 23 November 1989, Peguamcara perayu telah menulis kepada ejen tersebut menerima tawaran responden untuk membeli rumah-rumah kedai tersebut atas syarat nyata bahawa deposit sebanyak 10% dari harga belian dibayar selewatnya pada 28 November 1989. Pada 28 November 1989, ejen tersebut telah menjawab melalui surat mengesahkan tawaran responden untuk membeli rumah-rumah kedai tersebut dan melampirkan padanya 10% deposit yang tersebut.

Pada 29 November 1989, tiga orang (pembeli-pembeli yang dikatakan) telah menyebabkan satu writ dikeluarkan terhadap ejen dan perayu. Pembeli-pembeli yang dikatakan itu memohon, antara lain, perlaksanaan spesifik akan satu perjanjian yang telah dibuat lebih awal bagi penjualan rumah-rumah kedai yang sama kepada diri mereka. Pada hari yang sama pembeli-pembeli yang dikatakan telah mendapatkan satu injunksi *ex parte* yang menghalang perayu-perayu tersebut daripada memasuki mana-mana perjanjian bagi penjualan rumah-rumah kedai tersebut kepada mana-mana orang yang lain. Injunksi itu telah disampaikan kepada perayu pada 30 November 1989.

Dalam bulan Januari 1992, perayu telah tidak berjaya untuk membatalkan writ tersebut atau mengenepikan injunksi. Pada 29 Oktober 1994, perayu telah mengeluarkan saman menuntut suatu pengisytiharan bahawa perjanjian antara dirinya dan responden telah terbantut oleh injunksi tersebut. Saman tersebut telah ditolak dan perayu telah merayu kepada Mahkamah semasa, menghujah secara utamanya, bahawa tidak terdapat kontrak yang muktamad di antara responden dan dirinya kerana perjanjian tersebut adalah satu perjanjian yang telah dibuat "subject to contract."

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Secara umumnya, sesuatu perjanjian untuk membuat perjanjian tidak menghasilkan satu kontrak. Ianya adalah terpulang kepada Mahkamah, dalam setiap satu kes untuk meneliti perutusan surat antara pihak-pihak itu dan menyatakan samada itulah hasilnya yang diniatkan oleh pihak-pihak itu. Jika, walaubagaimanapun, Mahkamah mencapai keputusan yang bertentangan, maka akan terdapat satu kontrak yang boleh dikuatkuasakan.

[2] Kecuali pendekatan yang tersebut di atas diterima pakai, sesuatu pihak kepada sesuatu kontrak yang, selepas memuktamadkan persetujuannya, meragui transaksi itu, mungkin secara tidak adil berada dalam kedudukan yang menguntungkan untuk mencipta terma-terma imaginari berhubung mana perbalahan pendapat boleh ditimbulkan apabila dokumen yang lebih rasmi disediakan agar dapat mengelakkan diri daripada janjinya. Ahli-ahli peniaga akan kemudiannya mendapati kelonggaran terdapat pada undang-undang dan perdagangan akan terhenti sama sekali.

[3] Undang-undang akan memihak kepada mempertahankan persetujuan dan bukannya menolaknya sesuka hati. Prinsip ini terpakai bukan sahaja kepada dokumen-dokumen yang disediakan oleh orang-orang biasa tetapi juga kepada yang disediakan oleh Peguam-peguam.

[4] Dalam rayuan semasa, perutusan surat antara pihak-pihak tidak menunjukkan bahawa mereka tidak berniat untuk memuktamadkan kontrak sehingga satu perjanjian jualbeli yang rasmi telah disempurnakan oleh mereka. Ungkapan, "subject to the sale and purchase agreement" tidak menunjukkan suatu niat bahawa tiada kontrak harus wujud sehingga perjanjian jualbeli yang rasmi telah disediakan dan disempurnakan. Sebaliknya, ungkapan itu menunjukkan niat untuk hanya merasmikan perjanjian itu yang telah pun dijadikan muktamad antara pihak-pihak tersebut.

[5] Pihak-pihak kepada transaksi itu, hartanah, harga dan terma-terma penting telah kesemuanya dikenalpastikan dengan jelasnya. Perjanjian yang sedemikian secara biasanya disebut sebagai "open contract". Ianya boleh dikuatkuasakan seolah-olah ianya telah disemadikan dalam sesuatu dokumen dengan kesemua perkara yang wajib. Dan bagi menguatkuasakannya, undang-undang akan, bertindak menurut keperluan, menyiratkan terma-terma kepada kontrak untuk jualan itu bagi menguatkuasakannya.

[6] Injunksi tersebut telah diberikan selepas kontrak antara perayu dan responden telah dibuat; dengan itu, ianya tidak mempunyai apa-apa kesan ke atas transaksi yang telah diputuskan.

[Rayuan ditolak.]

Cases referred to:

Ayer Hitam Tin Dredging Malaysia Bhd. v. Y.C. Chin Enterprises Sdn. Bhd. [1994] 3 CLJ 133 ***(refd)***

Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon [1994] 1 CLJ 1 ***(cit)***

Lim Keng Siong & Anor. v. Yeo Ah Tee [1983] 2 MLJ 39 ***(cit)***

Masters v. Cameron [1954] 91 CLR 353 ***(refd)***

Hillas & Co. v. Arcos Ltd. [1932] All ER (Rep.) 494 ***(refd)***

Australian Broadcasting Commission v. Australasian Performing Right Association Ltd. [1973] 129 CLR 99 ***(cit)***

Liverpool City Council v. Irwin [1977] AC 239 ***(cit)***

Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai [1986] 3 SCC 300 ***(refd)***

Other sources referred to:

The Modern Law of Real Property, Dr. Geoffrey Cheshire, 10th Edn.

[Appeal from High Court Ipoh; Originating Summons No: 24-1016-92]

For the appellant - C. Abraham (James Devadason with him); M/s. Maxwell, Kenion, Cowdy & Jones

For the respondent - Mah Weng Kwai (Hira Singh & T. Gunaseelan with him); M/s. Mah Weng Kwai & Assoc.

JUDGMENT

Gopal Sri Ram JCA:

This appeal raises a short point which has arisen on numerous occasions and upon which there are several decisions of the highest judicial tribunal in this country. But for the very special circumstances of this case, to which we will refer in due course, we would have been disinclined to add to the volume of legal literature already in existence upon the subject.

The facts relevant to this appeal are as follows.

The appellant is the registered proprietor of two shophouses along Jalan Station, Ipoh. He wanted to sell them. He engaged the services of a firm of estate agents M/s. Muthu & Lee, to find a buyer. The asking price was RM450,000. In November 1989, the estate agents found a buyer in the person of the respondent who was prepared to pay that sum. They then communicated with the appellant's solicitors who, on 23 November 1989, wrote the following letter to M/s. Muthu & Lee:

We refer to the telephone conversation between your Mr. E.S. Muthu and our Miss J. Devadason of even date.

Your client's offer of RM450,000 for the purchase of the above-mentioned property is accepted on the condition that a 10% deposit is paid to us on 28 November 1989 by 12 noon, and the balance purchase price to be paid to us within three months from execution of the agreement upon which vacant possession of the property will be given to your client.

We confirm that our clients have agreed to pay your commission of one per cent (1%).

Kindly be informed time is of the essence. This transaction shall lapse should we not receive a deposit of 10% of the purchase price by 28 November 1989 by 12p.m.

The estate agents responded by their letter of 28 November 1989 as follows:

We refer to your letter JMD/LKH/41091 dated 23 November 1989.

2. We hereby confirm our client Mr. Lau Wing Hong I.C. No. 4405270 of No. 26, Jalan Datoh, Ipoh offer to purchase the above property at RM450,000 (Ringgit: Four Hundred and Fifty Thousand Only) and enclose herewith the 10% *vide* MBB Cheque No. 660088 as deposit subject to the sale and purchase Agreement.

3. Whereas the balance of the purchase price will be paid within three months from the date of the execution of the agreement with vacant possession. All quit rent and assessment will be apportioned as at date of transfer.

A day later, that is to say, on 29 November 1989, one Gurbachan Singh, Kartar Singh and Teja Singh caused to be issued a writ from the Ipoh High Court against the firm of M/s. Muthu & Lee and the present appellant seeking, *inter alia*, specific performance of an agreement made on either 24 November or 26 November 1989 for the sale of the same two shophouses to them. On the same date as the writ was issued, these three gentlemen obtained an *ex parte* injunction restraining the appellant from entering into any agreement for the sale of the shophouses in question to any other person. This injunction was served on the appellant on 30 November 1989. The appellant then took the position that the agreement, if any, it had with the respondent had been rendered impossible of performance and informed the respondent accordingly.

Later, in January 1992, the appellant unsuccessfully applied to have the writ struck out for want of prosecution and to have the injunction against it set aside. On 29 October 1994, the appellant took out a summons claiming a declaration to the effect that if there was an agreement between it and the respondent, then, such agreement had been frustrated by the grant of the injunction. The learned Judge who heard the summons, dismissed it but gave

no reasons for his decision. Against this decision, the appellant appealed to this Court. We heard the appeal on 17 September 1996 and dismissed it without calling upon Counsel for the respondent.

Mr. Abraham of Counsel for the appellant, in his opening address to us, identified the two issues that lie at the heart of this appeal. First, whether there was a valid and enforceable agreement between the parties to the appeal. Second, if there was such an agreement, then, whether that agreement had been frustrated by the grant of the injunction in question. Counsel urged that both issues should be resolved in the appellant's favour.

However, it was quite properly conceded by Mr. Abraham that if the first issue was resolved in the respondent's favour, no question of frustration could arise since a valid and enforceable agreement would, having regard to the chronology of events, have come into existence not later than 28 November 1989. The injunction having come after the conclusion of the contract, there was nothing upon which it could bite.

It was submitted on the appellant's behalf that there was no contract concluded between the parties. Mr. Abraham argued that the agreement to sell was subject to contract. He drew our attention to the phrase "subject to the sale and Purchase Agreement" appearing in the estate agents' letter of 28 November 1989 which he said showed that the parties were still negotiating. There were, Counsel submitted, many terms which the parties had not agreed upon. Some of these may never be agreed when the draft agreement was prepared and exchanged. Upon this premise, so it was said, there was no concluded contract.

In support of his argument, Mr. Abraham referred us to the decisions of the Supreme Court in *Ayer Hitam Tin Dredging Malaysia Bhd. v. Y.C. Chin Enterprises Sdn. Bhd.* [1994] 3 CLJ 133; [1994] 2 MLJ 754, *Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon* [1994] 1 CLJ 1; [1994] 1 MLJ 108, and to the decision of the former Federal Court in *Lim Keng Siong & Anor. v. Yeo Ah Tee* [1983] 2 MLJ 39.

Counsel also directed our attention to the following passage (at p. 765 of the report) in the judgment of Edgar Joseph Jr. SCJ in *Ayer Hitam (supra)* for the purpose of identifying the correct test that is to be applied in a case such as the present:

> True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284 at pp. 288, 289 where the Court said this:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

In *Branca v. Cobarro* [1947] KB 854, the agreement entered into by the parties contained a clause as follows: 'This is a provisional agreement until a fully legalized agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed.' It was held by the Court of Appeal that a binding agreement had come into effect.

But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v. Denny* [1921] 1 Ch. 57) or 'subject to the preparation and approval of a formal contract' (see *Winn v. Bull* [1877] 7 Ch. D. 29) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

We say 'generally' because in exceptional circumstances, the 'subject to contract' formula will not be so intractable as always and necessarily to prevent the formation of a contract. (See, for example, *Richards (Michael) Properties Ltd. v. Corp. of Wardens of St Saviour's Parish Southwark* [1975] 2 All ER 416, *Alpenstow Ltd. v. Regalian Properties plc* [1985] 2 All ER 545, *Filby v. Hounsell* [1896] 2 Ch. 737.)

We hasten to add, however, that in both *Richards* and *Alpenstow* the Court made it clear that nothing in the judgment was intended to throw doubt on the effect in law of the time-honoured expression 'subject to contract'. Indeed, in *Chinnock v. Ely (Marchioness)* [1865] 4 De GJ & Sm 638, at p. 646, Lord Westbury said this:

> ... if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.

Although the judgment of Edgar Joseph Jr. SCJ in *Ayer Hitam* contains all the learning upon the subject, we would, for completeness, refer to the following passage in the joint judgment of Dixon CJ, McTiernan and Kitto JJ, in *Masters v. Cameron* [1954] 91 CLR 353:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or implied, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

Meaning no disrespect to Counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the Court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the Court reaches an opposite conclusion, then there is an enforceable contract.

Unless the approach we have stated is adopted, a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loop-hole and commerce would come to a virtual standstill.

The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co. v. Arcos Ltd.* [1932] All ER (Rep.) 494, where he said:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the Court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law,

> *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.

This principle applies not only to documents drafted by laymen but also to those prepared by lawyers. See, *Australian Broadcasting Commission v. Australasian Performing Right Association Ltd.* [1973] 129 CLR 99.

We have examined the two letters that passed between the parties. We are unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, we find their objective intention to be travelling in quite the opposite direction.

They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will, acting out of necessity (see, *Liverpool City Council v. Irwin* [1977] AC 239), imply terms into the contract for sale in order to make it work. See, *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land a covenant on the part of the vendor to do all things necessary to give effect to the agreement.

Dr. Geoffrey Cheshire in the 10th Edn. of his work, *"The Modern Law of Real Property"* describes an open contract as follows:

> If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law.

The phrase "subject to the sale and purchase agreement" relied on by Counsel for the appellant do not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, they are, when read in the context of the correspondence and the objective aim of the transaction – and this is how we read them – indicative of an intention to merely formalise the agreement already concluded between the parties. We therefore entertain no difficulty whatsoever in rejecting the argument advanced by Mr. Abraham upon the first issue.

Since the injunction came after the contract between the appellant and the respondent had been made, it had no effect upon the transaction that had already been concluded. Further, there is material in the record provided that reasonably supports the inference that the respondent was really an innocent party who had entered into a contract with the appellant without any notice whatsoever of the alleged transaction on the basis of which the injunction was obtained. In these circumstances, we see no impediment to an application by the appellant to have the injunction dissolved so that the sale to the respondent may be proceeded without any further delay.

Having dismissed the appeal, we made those orders that are usually consequent upon a dismissal.

Reported by Gan Peng Chiang